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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Society for Savings in the City of Cleveland submits the following statement for the purpose of disclosing the basis upon which the Supreme Court of the United States has jurisdiction, to review, on appeal, the judgment of the Supreme Court of Ohio, entered in this case.

I. Nature of the Case and Questions Involved

This case involves the constitutionality of Ohio statutes, which the Supreme Court of Ohio has so construed as to permit the State of Ohio to tax a mutual savings bank upon its surplus and reserves, without deduction of the United States obligations owned by the bank.

The bank has no capital stock and no shares or shareholders. The tax is (1) levied against the bank; (2) measured by the net book assets of the bank, including all United States obligations owned by it; (3) paid by the bank; and (4) the bank has no right to reimburse itself for the tax paid by collecting prorata portions of the same from depositors.

The Tax Commissioner of Ohio asserts a novel theory that this tax was on some "intangible property right" of the depositors, additional to their deposits themselves (which are separately taxed). He contends that the bank is reimbursed for the tax, because the payment of the tax by the bank diminishes its assets, and that the economic effect upon the depositors is the same as if the bank had recouped the amount of the tax by collection from the depositors.

Society for Savings in the City of Cleveland (hereafter called Appellant) contends that these statutes, as so construed, are repugnant to Article I, Sec. 8, Cl. 2, of the Constitution of the United States;[1] to Sec. 3701 of the Revised Statutes of the United States (31 USCA § 742);[2] and to the supremacy clause of the Constitution, Article VI, paragraph 2;[3] or, in an alternative, to Amendment XIV of the Constitution. The questions are stated at greater length in the Assignments of Error.

---

[1] "The Congress shall have power * * * to borrow Money on the credit of the United States."

[2] "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority."

[3] "This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme law of the land."

II. Statutory Provision Sustaining the Jurisdiction

The jurisdiction of the United States Supreme Court to review on appeal the judgment appealed from is sustained by Title 28, U. S. Code, Sec. 1257(2).

III. State Statutes, the Validity of Which Is Involved

The Ohio statutes imposing the tax are set forth in full in the Journal Entry of the Ohio Board of Tax Appeals, Appendix B to this Statement. The language important in this appeal is as follows:

> "*Ohio General Code, § 5408 (taxable property of financial institutions, how listed, assessed and taxed)* * * * the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."
>
> "Ohio General Code, § 5412. Upon receiving such report the Tax Commissioner shall ascertain and assess * * * the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report. * * *"

IV. Summary of Facts and Proceedings

Society for Savings in the City of Cleveland is a mutual savings bank incorporated under the laws of the State of Ohio. It has no capital stock; it has only surplus and undivided profits which are held for protection against possible decline in value of its assets, and are equivalent to net worth.

The State of Ohio, acting under the statutes quoted above, assessed against the bank, taxes based upon its "sur-

plus or reserve fund and undivided profits", and in so doing included the value of all of the United States obligations, owned by the bank. Such taxes for the years 1947 to 1951 inclusive, here in question, totaled $126,115.96. All of these taxes resulted from the inclusion of United States obligations, in the assets of the bank, because the value of United States obligations owned by the bank exceeded the bank's surplus and reserves, for each of the years in question.

The bank has also paid a tax based upon the amount of its deposits. Under Ohio law, this tax is levied against the property right of the depositors measured by the amount of their deposits, and the bank is authorized to reimburse itself for the amount so paid by a charge to the depositors' accounts. There is no issue in this case about this tax on deposits.

The unconstitutionality of the Ohio statutes, in taxing the bank without deduction for its United States bonds, has been the issue in this litigation from its inception. The Application for Abatement, to the Tax Commissioner (R. 3) and the Notice of Appeal to the Board of Tax Appeals (R. 7) were based on this contention. The Tax Commissioner denied the Application. The Board of Tax Appeals reversed, on the federal constitutional and statutory grounds here raised (see Appendix B). The Tax Commissioner appealed to the Supreme Court of Ohio which, on March 10, 1954, reversed the Board of Tax Appeals and held that the Ohio statute and the tax were not repugnant to either the Constitution or the Statute of the United States (Opinion, 161 O. S. 122, 118 N. E. 2d 651, and Appendix A attached hereto). Application for rehearing was timely filed and was denied March 31, 1954. Petition for appeal was presented to the Supreme Court of Ohio on the 3rd day of June, 1954.

V. The Federal Question Is Substantial

The Ohio tax is admittedly an *ad valorem* property tax. It is levied against the banking corporation, measured by its surplus, reserves and undivided profits, including the value of its federal bonds.

The decision of the Ohio Supreme Court, holding the tax constitutional, conflicts directly with a long line of decisions of the United States Supreme Court. In *Weston* v. *City Council*, 2 Pet. 449, Chief Justice Marshall said:

> "Can anything be more dangerous or more injurious, than the admission of a principle which authorizes every state * * * to burden the exercise of this power (to borrow money on the credit of the United States) at their discretion."

States have made a series of attempts to tax banks and insurance companies on the value of their capital and surplus, without excluding from their assets, their federal bonds. The United States Supreme Court has held that this device of taxing net worth is equivalent to taxing the federal bonds, and is unconstitutional. *Bank of Commerce* v. *New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *Home Savings Bank* v. *Des Moines*, 205 U. S. 503 (1907); *Farmer's Bank* v. *Minnesota*, 232 U. S. 516 (1914); *Missouri Insurance Company* v. *Gehner*, 281 U. S. 313 (1930); *New Jersey Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665 (1950).

In those cases, as in the instant one, taxes were levied upon banks or insurance companies and borne by them. Such taxes are distinguished from taxes on shares of stock, owned by shareholders, where the tax is borne by the shareholder; shares of stock are property, held to be, in themselves, property taxable to the owner of the shares. The bank may be made the collector of the tax, if it is given a

right of reimbursement against the shareholder, who bears the tax.

The distinction was made clear in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, where a bank had been compelled to pay a tax on the value of its capital shares, without deduction of the United States bonds owned; it was not given a right of reimbursement from the shareholders. The tax was held invalid.

> "The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks." (Opinion 511.)

In the instant case, it is not claimed by the Tax Commissioner of Ohio nor asserted by the Ohio Supreme Court that there is any right in the bank to recoup the tax from anyone; the State does claim, first, that the depositors have an "intangible property interest" in the surplus and, second, that the bank can be compelled to pay the tax assessed against such "intangible property interest" without any right to recoup the amount so paid from the depositor, who is said to own it.

This claimed "intangible property interest" of the depositor is a novel theory. It is not his deposit; "deposit" is defined by Sec. 5324 of the Ohio General Code as that which the depositor is "entitled to withdraw in money". This is separately taxed against the depositor.

Beyond his deposit, the depositor has no interest that is measurable, or capable of valuation, or transferable, or separable from the deposit. The surplus is a protection to

his deposit, against losses by the bank; when he withdraws his deposit, he no longer has even this benefit. The Record (p. 14) shows that about 20,000 persons each year cease to be depositors, and more than that number become new depositors.

Where a federal right is concerned, the Supreme Court of the United States is not bound by the name given to a state tax by state courts or legislatures; that court alone determines the real nature of the tax and its effect upon the federal right. *United States* v. *County of Allegheny* 322 U. S. 174; *Carpenter* v. *Shaw*, 280 U. S. 363. As stated in *Senior* v. *Braden*, 295 U. S. 422 at page 429:

> "The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

Wisconsin v. *J. C. Penney Company*, 311 U. S. 435, at page 443:

> ". . . The descriptive pigeon hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

Even if the surplus of the bank were owned jointly by all the depositors, such ownership is very different from a separate property, such as stock, which can be taxed. If we did have a joint ownership of the surplus, including the United States bonds, the joint-owners could no more be taxed on their United States bonds than could the bank itself. The inherent vice of taxing the bonds is the same.

As was said in the dissenting opinion below (p. 146):

> "The same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. * * * The vice in the tax assessment is in taxing property which

> includes federal securities, without the deduction of such securities."

It is also true that even if the depositor had a property right in the surplus of the bank, such as could be taxed against him, the bank could not be compelled to pay his tax, without the right to collect it back from him.

To compel one person to pay the taxes on the property of another, without right of reimbursement, is a deprivation of property without due process of law, and would violate the Fourteenth Amendment. This point was also raised in the State Court, but would become important only if the United States Supreme Court should find that the tax is on property of the depositors; it therefore is not amplified here.

In its effort to argue that the tax is on the depositors and not upon the bank, the State of Ohio attempts to meet the requirement, established by the United States Supreme Court, that a tax paid by a bank cannot be held to be a tax against a third person unless the bank has the right to recoup the tax so paid, from the person for whom it has paid it. The Ohio Supreme Court, in the majority opinion (p. 137) argues that the corporation is "reimbursed" because the value of its surplus has been reduced.

> "Such payment (of the tax) will necessarily reduce the amount which the corporation will have available for payment of interest to depositors * * * and which will be available for protection of their deposits * * * and for distribution to them in the event of liquidation of the corporation."

But this is not reimbursement or recoupment of the tax paid. The tax is paid by the bank; it gets nothing back; its net worth is permanently diminished.

The same argument would be applicable to a tax based on value of capital shares against a bank having capital shares. The argument was attempted, and rejected by the

United States Supreme Court, in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503:

(P. 511)

"It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings; * * * but the two kinds of taxes are not equivalent in law, because the State has the power to levy one and had not the power to levy the other."

(P. 520)

"Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the *Bank of Commerce case* and the *Bank Tax case*, and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

The question decided in *Farmer's Bank* v. *Minnesota*, 232 U. S. 516, was substantially the same as the issue in the instant case. The bank was a mutual savings bank, having no shares; the tax, likewise, was to be paid by the bank and was on the value of the surplus and undivided profits; there was no right of reimbursement from depositors.

The Court held unanimously, page 528:

"But if the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal (in federal territory) bonds. * * * It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property

tax thereon, was repugnant to the Constitution of the United States."

The federal question is substantial not only in principle, in its effect upon the financing of the United States, but also in the large amount of United States bonds affected. Appellant itself owned more than $100,000,000 of United States obligations; other mutual savings banks in Ohio own additional amounts. What is more important is the fact that if this decision of the Ohio Supreme Court is allowed to stand unreversed, so that this bank is required to pay the tax, without deduction of the value of its federal obligations, the device will almost certainly be seized upon by many other states.

The long history of cases in the United States Supreme Court has shown the eagerness of the states to find some device to tax the value of United States bonds, in banks. There are 573 mutual savings banks in the United States; their total holdings of United States obligations are more than $9,100,000,000.

We submit that the basic reason, underlying the constitutional prohibition, is applicable to this tax; *Missouri* v. *Gehner, supra,* 281 U. S. at page 321:

> "As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government * * * Neither ingenuity and calculation nor form of words in state enactments can deprive the owner, of the tax exemption established for the benefit of the United States."

The statement in *New Jersey Insurance Company* v. *Division of Tax Appeals,* 338 U. S. 665 at page 675, is applicable here:

> "The result which is thus indicated is also required by the legislative purpose, which we have found in

§ 3701, 'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit.' *Smith* v. *Davis*, 323 U. S. 111, 117 (1944)."

Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, U. S. Code, Sec. 1257(2).

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Dated: June 3, 1954 .

APPENDIX A

OPINION OF THE SUPREME COURT OF OHIO
together with

DISSENTING OPINION OF STEWART, *J.*

Reported in 161 O. S. 122, 118 N. E. 2d 651

Decided March 10, 1954

IN THE SUPREME COURT OF OHIO

No. 33,523

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, *Appellee*

vs.

JOHN W. PECK, Tax Commissioner of Ohio, *Appellant*

TAFT, *J.:*

The question to be decided is whether, in ascertaining and assessing "the value of the property representing the capital employed by [an incorporated] financial institution, not divided into shares," pursuant to Section 5412, General Code, the Tax Commissioner must eliminate federal securities owned by such institution in computing "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits" of such institution.

It should be observed that the word "capital," when used with reference to a corporation, may be used to describe at least three different things. For example, it may be used (1) to describe all the property or assets of the corporation (see *National Bank* v. *Commonwealth*, 76 U. S. [9 Wall.] 353, 19 L. Ed. 701, 702), (2) to describe a bookkeeping figure representing a part or all of the net worth of the corporation (*Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor*, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326), and (3) to describe part or all of the property interest in the corporation which belongs to its shareholders or other owners.

The difference between the first and third of the above-mentioned uses of that word is well demonstrated in the opinion by Mr. Justice Miller in *National Bank* v. *Commonwealth, supra*, where is it said:

"* * * it has been established as the law governing this court that the *property or interest of a stockholder in an incorporated bank, commonly called a share*, the *shares in their aggregate totality being called sometimes the capital stock* of the bank, *is* a *different* thing *from* the monied *capital of the bank* held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the state, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the states on stock or shares so held by them, although all the capital of the bank be invested in federal securities * * *." (Emphasis added.)

Considerable care must therefore be used in determining what the word "capital" means in each instance in which it is used in the statutes here involved.

Before analyzing the statutes involved, it will also be helpful to state several basic propositions of law which seem to be well settled.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a p operty tax against a corporation *on its* capital or *on its* net worth without excluding federal securities in the computation of *such* capital or net worth. In the absence of such an exclusion, such a tax is regarded in effect as being a tax on the federal securities. *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor,*

supra; Farmers and Mechanics Savings Bank of Minneapolis v. *Minnesota*, 232 U. S. 516, 58 L. Ed. 706, 34 S. Ct. 354; and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 94 L. Ed. 439, 70 S. Ct. 413.

3. On the other hand, a state may levy a property tax on the ownership interests of the shareholders of a corporation, even though all the assets of the corporation are federal securities and even though the net worth of the corporation is used as the measure of the value for such taxation of the ownership interests in the corporation. See for example *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394, affirming 62 Ohio St., 266, 56 N. E. 1036; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *National Bank* v. *Commonwealth*, *supra*; and *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23.

As stated in the leading case of *Van Allen* v. *Assessors*, 70 U. S. (3 Wall.), 573, 583, 18 L. Ed. 229:

"* * * the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen* v. *Arnoud* [9 Adolph & E. N. S. 806]. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in

proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed * * *."

Furthermore, merely because a statute requires a corporation primarily to pay a property tax on the ownership interests of its shareholders, such tax is not necessarily a tax on the property of the corporation. See for example *Cleveland Trust Co.* v. *Lander, supra; Aberdeen Bank* v. *Chehalis County, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor, supra.*

As stated in the opinion in the leading case of *National Bank* v. *Commonwealth, supra:*

"But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay the tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are, therefore, of the opinion that the law of Kentucky is a tax upon the shares of the stockholder."

As to the Society for Savings, the answer to the question, whether the tax provided for by Section 5408, General Code, may be levied without excluding federal securities from the computation provided for in Section 5412, General Code,

depends on whether the tax is or is not on the property *of* the corporation which is the owner of those federal securities, or on part or all *of its* net worth. This in turn depends upon the meaning of the words in Section 5408, General Code, "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock." Admittedly, the capital of the Society for Savings is not divided into shares and it has no capital stock.

In considering these statutory words, the question immediately arises as to whose "capital" or whose "property" is to be taxed. Is it the capital or property of the financial institution or is it the capital or property of the owners of the financial institution?

On a hasty reading of these words, it might appear reasonably arguable that, standing alone, these words could be given either meaning.

However, if these statutory words are examined with reasonable care, it is difficult to comprehend how "capital employed, or the property representing it, in a financial institution" could properly be used to describe capital or property of and belonging to such institution. It is apparent from a reading of Section 5412, General Code, that these words could not have been intended to describe all the assets of the bank. That section provides for assessing "the value of the property representing the capital employed by such financial institution * * * at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits." So far as the corporation is concerned, such an amount is a mere bookkeeping figure and is not represented by any property of the institution. See *Southern Gum Co.* v. *Laylin*, 66 Ohio St. 578, 596, 64 N. E. 564. The property of the institution is an important factor in determining what it is but there is another equally important factor in its determination, that is, the debt obligations of the institution including its deposit obligations. On the other hand, the interests of the owners of the corporation are as to them a species of intangible property and are sometimes described as their capital investment in the corporation or the capital which the owners have "*in*" the corporation. As so used,

such "capital employed * * * in" the corporation is always regarded as a species of intangible property belonging to such owners. As to them, their intangible property interest in the corporation may well be said to be "property representing" their "capital employed * * * in" the corporation.

Furthermore, the General Assembly clearly disclosed that it knew how to use the word "capital" to describe the capital of the corporation. Thus, after referring to "the capital employed * * * *in* a financial institution," it used the words "*the capital of which* is not divided into shares, or *which has no capital stock*." If it had intended the words "the capital *employed* * * * *in* a financial institution" to mean "the capital *of*" such institution, it could easily have said "the capital of a financial institution [which is] not divided into shares" instead of "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares," thus eliminating the use of at least nine words and clearly expressing that intent. The General Assembly did not do that. By using the words "capital employed * * * in" instead of "capital of" a financial institution at the same time that it showed that it knew how to use the words "capital of" such an institution, the General Assembly clearly indicated an intention to distinguish between the capital of or belonging to such institution and the capital of and belonging to the owners and employed *in* the institution.

In addition, when the whole of Section 5408, General Code, is read, it is apparent that it is the capital or property of the owners of the institution and not that of the institution which the General Assembly intended to describe by the use of the words "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

Section 5408, General Code, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

As to the first two objects of taxation, it is clear that the property intended to be taxed is that of the owners of the financial institution, that is, its shareholders, and not the property of the financial institution. It would not be reasonable to impute to the General Assembly an intent, with respect to the third object of taxation there dealt with, to provide for taxing the property of the financial institution, instead of the property of the owners of the financial institution, unless the language used clearly required the imputation to the General Assembly of such an inconsistent intent.

With respect to statutory provisions somewhat similar to Section 5409, General Code, it is said in the opinion in *Des Moines National Bank* v. *Fairweather, Mayor, supra*, at pages 110 and 111:

"As construed by the Supreme Court of the state, the statute as a whole contemplates * * * that the shares be assessed to the stockholders as their property; and as illustrating that the statute makes a clear distinction between the shares and the property of the bank, the court points to the provision which requires that the real estate be assessed against the bank and to the succeeding provision which declares that 'the property of such corporation shall not be otherwise assessed.' This, without more, seems completely to refute the contention that what the statute really directs is an assessment of the bank's property instead of the stockholders' shares."

Likewise Section 5412, General Code, makes it apparent that the General Assembly intended to tax the property of the owners of financial institutions with respect to all three of the above mentioned objects of taxation dealt with in Section 5408, General Code. Thus the first sentence of

that section provides for a uniform manner of ascertaining and assessing the amount at which the property is to be taxed with respect to all three of those objects of taxation.

Also, that sentence obviously regards "shares of stockholders in a financial institution [as appears from Section 5408, General Code, these are the "shares" meant]" which has shares as having a taxable equivalent in a financial institution which has no shares. It describes that taxable equivalent as "the value of the property representing the capital *employed by* [not "of"] such financial institution, not divided into shares." "Shares of stockholders in a financial institution" obviously are evidence of and represent "capital employed by" a financial institution where it has shares. See Section 5408, General Code.

The legislative intent, that the words "capital employed in" or "by" a financial institution not having shares should describe the intangible property interest of the owners of such an institution just as the words "shares in" do, is further demonstrated by the words of Section 5638-1, General Code, levying the tax on "the kinds and classes of intangible property * * * enumerated" including "shares in and capital employed by financial institutions."

Such conclusion is further fortified by the last sentence of Section 5412, General Code, which deals with financial institutions having only withdrawable shares. By the provision of Section 5324, General Code, such shares are defined as "deposits"; and, in describing the first of the three above-mentioned objects of taxation dealt with in Section 5408, General Code, the shares of such institutions are expressly excepted from the shares of the classification of financial institutions there involved. Under Section 5406, General Code, those withdrawable shares must be returned as deposits. Under the first sentence of Section 5412, General Code, their amounts are assessed for taxation as deposits but not as "shares." However, the last sentence of Section 5412, General Code, provides for their assessment also as shares and states with respect to them that "such assessment of shares shall exclude the capital stock thereof * * * [already assessed as deposits] but shall include the surplus or reserve and undivided profits * * *." *First*

Federal Savings & Loan Assn. of Warren v. *Evatt, Tax Commr.*, 143 Ohio St., 243, 54 N. E. (2d), 795.

Our conclusion is that the words, "capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock" as found in Section 5408, General Code, the words "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in Section 5612, General Code, and the words "capital employed by financial institutions" as found in Section 5638-1, General Code, were intended by the General Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the property of or belonging to such an institution. It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation. The Society for Savings is such an incorporated financial institution.

However, it is argued that such a legislative intention cannot be given effect because there is no statutory provision which would enable the Society for Savings to secure reimbursement from those whose property would be taxed for the tax thereon that the Society for Savings would be required to pay.

In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable

an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners *in* the corporation. In our opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement. *Citizens National Bank* v. *Commonwealth of Kentucky*, 217 U. S. 443, 54 L. Ed 832, 30 S. St. 532; *Aberdeen Bank* v. *Chehalis County*, *supra*; and *National Bank* v. *Commonwealth*, *supra*.

With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who can have any claim to benefit from the ownership interests taxed.

Payment by the corporation of the tax on their intangible ownership interests in the corporation will necessarily reduce, to the extent of the payment made, those funds available for payment of interest on their deposits, and will likewise reduce the amount available only to them in the event of liquidation of the corporation. In the instant case, it appears that there was available for payment of interest on deposits more than enough to pay the taxes assessed against the owners of the "capital employed in" and "by" the Society for Savings as measured by the provisions of Section 5612, General Code, for assessment of that "capital." That capital, as well as their deposit claims, was owned by the depositors.

The decision actually rendered by this court in *Collett, Treas.* v. *Springfield Savings Society*, 56 Ohio St. 776, 49 N. E. 1109 (affirming without opinion 13 C. C. 131, 7 C. D. 146), is not inconsistent with such a conclusion.

In the opinion of *Bank Commissioners* v. *Watertown Savings Bank*, 81 Conn. 261, 70 A. 1038, it is said:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings-banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this state, that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon."

In *Barrett* v. *Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 A. 543 ("affirmed, for the reasons stated," 66 N. J. Eq. 431, 57 A. 1131), it is said on page 434 in the opinion in quoting with approval from the opinion in *Hannon* v. *Williams*, 7 Stew Eq. 255:

" 'In a savings bank the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity they are the stockholders among whom the profits are divided. In case of insolvency they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed.' "

In *Huntington* v. *Savings Bank*, 96 U. S. 388, 24 L. Ed. 777, it is said in the opinion by Mr. Justice Strong:

"* * * the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons,

the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security."

In *Lewis, Admr.*, v. *Lynn Institution for Savings*, 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785, it is said on page 243 in the opinion by Allen, J.:

"* * * the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depositors; but the latter are to share whatever profit may be made in just proportion among themselves. * * *"

In *Cogswell* v. *Rockingham Ten Cents Savings Bank*, 59 N. H. 43, it is said in the opinion by Clark, J.:

"The assets of savings-banks consist of loans of money made by them for the benefit of their depositors, from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings-banks stand in the same relation to the assets of the bank as stockholders to banks of discount."

See also *Worcester County Inst. for Savings* v. *City of Worcester*, 10 Cushing (Mass.), 128, and *Providence Inst. for Savings* v. *Gardner*, 4 R. I., 484, indicating that the depositors of an incorporated financial institution having no capital stock, in addition to being creditors of the corporation, have ownership interests in such corporation corresponding to the ownership interests of the shareholders in an incorporated financial institution having shares of capital stock.

Thus, the ownership interests of the depositors in the corporation and not any capital or property of or belonging to the corporation are the property which is to be taxed pursuant to Section 5408, General Code, assessed pursuant to Section 5412, General Code, and upon which the two-mill tax is levied under Section 5638-1, General Code; and it appears that the corporation, although required to pay the

tax, will, in doing so, be imposing the full burden of that tax on those whose property interests are taxed.

It is further argued, in effect, that the value of the interests of a depositor in the Society for Savings can never rise above the amount of his deposit unless the corporation goes into liquidation, that anyone by making a deposit can secure interests equal to that of an existing depositor having a deposit of the same amount, and that therefore a depositor's interests cannot be subjected to taxation at an amount in excess of the amount of his deposit.

This argument might be persuasive if it were true that the property interest of a shareholder of a corporation could not be taxed at an amount equal to the book value of his shares in the corporation where such book value exceeded the actual value of the shares. We do not believe that any such contention could or even would be made. The book value of shares of stock may be more or less than the value of such shares. It may be much more. *Opdyke* v. *Security Savings & Loan Co.*, 157 Ohio St., 121, 148, 105 N. E. (2d), 9.

On the other hand, as to a depositor in a corporation such as the Society for Savings, it is not likely that the total of the amount of his deposit plus the amount of the book value of his ownership interest as a depositor (this total being the book value of all his interests in the corporation) will ever be much more than what he can withdraw in cash at any time. When taxed on that total, *i.e.* the book value of all his interests in the corporation rather than only on the lesser withdrawable amount of his deposit, a depositor of such corporation is not exposed to as great a taxation hazard as is a shareholder of a bank, who may be taxed on the book value of his shares even though such shares have no withdrawable value and have a realizable market or even actual value very much below their book value.

Unlike in *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 51 L. Ed., 901, 27 S. Ct., 571, our statutes do not justify our reaching a conclusion in the instant case similar to that reached by the Iowa Supreme Court in that case, that the taxes are levied on the corporation. As hereinbefore pointed out, the property to be taxed under our statutes is "the capital employed * * * in" or "by" a financial insti-

tution, that is, the intangible property interests of ownership of the owners of the institution representing that capital, not the capital *of* the financial institution. The "taxes" here involved are "*levied* on * * * kinds and classes of intangible property * * * enumerated," including "shares in and capital employed by [not capital of] financial institutions"; and, as hereinbefore pointed out, the General Assembly clearly indicated an intention that it is the capital of the owners of the institutions and not of the institutions that is to be taxed. See Sections 5408 and 5412, General Code.

As we view it, the *Des Moines case* holds merely that the fact, that a bank may in effect reimburse itself from its shareholders on account of a tax levied against it on its net worth, will not justify the conclusion that, in computing such net worth, it is unnecessary to exclude federal securities. Here, unlike in that case, the taxes are not levied against the corporation on the capital or net worth of the corporation but are levied against the ownership interests of the owners of the corporation, whether or not such ownership interests are evidence by shares or capital stock.

As stated on page 518 in the opinion in that case:

"The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S., 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation. There is nothing in them which justifies the tax under con-

sideration here, *levied*, as has been shown, on the corporate property."

It may be observed that the *Des Moines case* involved "a tax * * * levied under a law * * * which provided that 'shares of stock of state * * * banks * * * shall be assessed to such banks * * * and not to the individual stockholders.'" At the same time, the statutes of that state expressly provided that shares of stock of national banks should be assessed to the individual stockholders.

That *Farmers & Mechanics Savings Bank of Minneapolis* v. *Minnesota*, *supra*, is not applicable appears from the following in the court's opinion:

"The Supreme Court of Minnesota held that this section imposed * * * a property tax, and that the surplus *of* savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question." (Emphasis added.)

Likewise, the cases of *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor*, *supra*, and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*, each involved the levy of a tax against a corporation on part or all of the net worth of the corporation. As hereinbefore pointed out, the taxes in the instant case are not levied on any part of the net worth of the financial institutions but are levied on the interests of the owners of such institutions in the capital of such institutions, whether evidenced by shares of stock or not so evidenced.

The decision of the Board of Tax Appeals is reversed and the order of the Tax Commissioner is affirmed.

Decision reversed.

WEYGANDT, C. J., MIDDLETON, ZIMMERMAN and LAMNECK, JJ., concur.

STEWART, J., dissenting. I am unable to agree with the conclusion of the majority of the court with reference to the taxation of the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock.

Ever since Chief Justice Marshall's historic opinion in

M'Culloch v. *Maryland*, 17 U. S., 316, 4 L. Ed., 579, both by judicial decision and legislative fiat a state can not levy a property tax on federal securities, no matter who may be the owner of them.

Section 5408, General Code, as stated in the majority opinion, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

I entirely agree with the majority that the shares of a financial corporation may be taxed and that the value of the shares may be ascertained by adding the amount of the capital, the surplus or reserve fund, and the undivided profits, without any deduction of federal securities in those items. This is so because it has long been held that the shares of a financial institution are a property apart from the assets of the institution, and in Ohio the tax on such shares, although levied in the name of the institution, is really a tax on the owners of the shares, and Sections 5672 and 5673, General Code, provide for reimbursement to the financial institution from the shareholders for the payment of the tax assessed on the shares.

I likewise agree that a tax may be levied on the deposits in a financial institution for, again, that tax is on credits which are owned by the depositors.

Where one has a deposit in a financial institution, the relation of debtor and creditor arises, and a deposit, therefore, is not an asset of the institution but is, indeed, a liability because the institution owes the amount of it to the depositor.

In Ohio the tax on a deposit is on property separate and apart from any assets of the bank and, although assessed

in the name of the bank, it is really against the depositor, and in Sections 5673-1 and 5673-2, General Code, provision is made for reimbursement to the bank from the depositor for the tax paid on the deposit.

However, in reference to the provision for taxing the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock, I am of the opinion that such a tax can not be assessed without first deducting federal securities which are a part of the property to be taxed. Such a tax, as stated in Section 5412, General Code, is on the aggregate amount of the capital, surplus, reserve fund, and the undivided profits. The tax is assessed against the financial institution itself and there is no provision for such institution to recover from any one the tax paid as there is specifically made in reference to a tax on shares or deposits.

It is argued that the tax assessed against such an institution without shares is, in actuality, assessed against the owners of the capital, surplus, reserve fund, and undivided profits, and that such owners are the depositors in the institution.

Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own.

What depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution without shares?

The majority opinion asserts that present depositors own it.

Why should one who becomes a depositor today own a share of the surplus and undivided profits of a savings

institution, which have been built up by present long time depositors and by great numbers of past depositors who have drawn out their deposits (and that is all they can get), but whose deposits have built up the surplus assets of the institution?

It seems to me that when it is said that the depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution, it is going to be an impossible task to ascertain what depositors own such assets and in what proportions.

Where a deposit is made in a bank, the bank is a debtor of the depositor, and, assuredly, at least during the corporate existence of the bank, the depositor can receive nothing in excess of the actual deposit he made.

Assuming that the depositors do own the capital employed, or the property representing it, in a financial institution without shares, it seems to me that it would still be unlawful to assess a tax against such property without deducting any federal securities therefrom. A state cannot levy a property tax on federal securities, regardless of who owns them.

It is conceded in the majority opinion that the tax against the capital employed or the property representing it can not be assessed if such capital and property belong to the financial institution itself. In my opinion, the same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. The ownership of the property is not essential. The vice in the tax assessment is in taxing property which includes federal securities, without the deduction of such securities.

In the case of *Farmers & Mechanics Savings Bank of Minneapolis* v. *State of Minnesota*, 232 U. S. 516, 58 L. Ed. 706, 34 S. Ct. 354, it was held, in paragraph three of the L. Ed. headnotes:

"A state, in taxing as credits the surplus of a savings bank, ascertained by deducting from its assets the amount of its deposits and other accounts payable, must leave out of the computation of its assets bonds issued by territorial

municipalities which are exempt fr. n taxation as the obli gations of an agency of the federal gov rnment."

That case concerned a savings bank having no capital stock and taxable under a Minnesota law which provided for ascertaining the surplus remaining after deducting from its assets (other than real estate which was separately assessed) the amount of the deposits and all other account payable, the surplus being taxed as "credits."

The Supreme Court of Minnesota had held that the state law imposed not a franchise but a property tax and that the surplus of the savings bank as thus determined was taxable property.

In the opinion Justice Pitney said:

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black 620, it was held that the state of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the state. And see *Bank Tax Case*, 2 Wall. 200; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 509.

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

There is no claim anywhere in the majority opinion here that the imposition of the tax concerned anything but a property tax, so it seems to me that the decision of the *Farmers & Mechanics Savings Bank case, supra*, is dispositive of the question before us.

In *People, ex rel. Bank of Commerce v. Comrs. of Texas*, 67 U. S. 620, 17 L. Ed. 451, it was held, in the L. Ed. headnotes:

"The stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is not subject to state taxation.

"It makes no difference that the tax is on the aggregate of the tax payer's property, and the stock is not taxed by name."

If the capital stock of a bank with shares can not be taxed without deducting any federal securities, how is it legally possible to so tax such capital stock of a savings bank without shares?

It can be much more cogently argued that the tax assessed against the capital of the bank with shares would be borne more acutely by the shareholders than would the tax assessed against the capital of the bank without shares be borne by its depositors.

It seems to me that taxing the capital employed, or the property representing it, and ascertaining its value at the aggregate amount of the capital, the surplus or reserve fund, and the undivided profits, without deducting therefrom any federal securities contained therein, is repugnant to the Constitution of the United States, regardless of who the owner of that property may be, and that a judgment upholding such procedure is in direct conflict with the declaration of the Supreme Court of the United States in the *Farmers & Mechanics Saving Bank case, supra.*

It must be remembered that the present case involves the imposition of a tax and not a claim for exemption from one. In such a situation, the law must be strictly construed against the taxing authority.

APPENDIX B

JOURNAL ENTRY OF THE OHIO BOARD OF TAX APPEALS

Dated March 2, 1953

BEFORE THE BOARD OF TAX APPEALS DEPARTMENT OF TAXATION
STATE OF OHIO

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO
Appellee.

March 2, 1953

No: 22464

ENTRY

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 21, 1952 by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's transcript for the years in question, an agreed statement of facts signed by counsel, the evidence presented to this Board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Society for Savings in the City of Cleveland, appellant, hereby gives notice of its appeal to the Board of Tax Appeals from the findings of the Tax Commissioner, made on the 30th day of July, 1952. A true copy of the notice of said findings, sent by the Tax Com-

missioner to appellant, is attached hereto and incorporated herein by reference.

Appellant claims that said findings are erroneous in that they determine that there has not been any overpayment by the appellant of its intangible taxes for the years 1947 through 1951. The assessments of said taxes, as the findings of the Tax Commissioner correctly infer, included in the valuation of appellant's capital employed, obligations of the United States owned by appellant. The value of such obligations of the United States, should have been excluded, in assessment of the tax, because the Constitution of the United States, as interpreted by the Supreme Court of the United States, and the provisions of Section 742, Title 31, United States Code, require or provide that obligations of the United States shall be exempt from taxation by any State. Such exemption, if accorded to obligations of the United States owned by appellant, would have left none of appellant's capital subject to tax by the State of Ohio for the years in question. Consequently, the entire amount of taxes paid to the State of Ohio, for the years 1947 through 1951, namely $126,115.96, was overpaid, and appellant is entitled to a certificate of abatement for the same pursuant to Section 1464-3, Ohio General Code; and the findings of the Tax Commissioner were erroneous as a matter of law."

The final order of the Tax Commissioner complained of reads as follows:

"This day the application of Society for Savings in the City of Cleveland, Cleveland, Ohio a financial institution, for a Certificate of Abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a Certificate of Abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the provisions of Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied."

The agreed statement of facts filed with the Board of Tax Appeals under date of November 12, 1952, reads as follows:

"The parties hereto, by their counsel duly authorized, hereby stipulate and agree that the following facts are true:

Appellant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, which has no capital stock. It was originally incorporated pursuant to a special act of the General Assembly of Ohio passed in 1849 (47 O. L. 279), supplemented by acts passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148a to 710-148 l, inclusive, General Code, by filing its certificate of election pursuant to Section 710-148k, General Code. Appellant's office and place of business are located at 127 Public Square, Cleveland, Ohio.

Each of appellant's financial institution tax returns for the years 1947 to 1951, inclusive, included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by appellant. The amounts of such obligations of the United States so included in such tax returns for each of such years were as follows:

Year	*Book Value of U. S. Obligations*
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

The tax returns filed by appellant, Society for Savings in the City of Cleveland, for the years here involved are true statements as to the books of account of the appellant for said years.

The amounts of the taxes assessed pursuant to the provisions of Section 5412, General Code, (excluding the taxes assessed on taxable deposits) for each of such years were as follows. Such amounts were paid by the appellant on the date indicated:

Year	*Amount of Tax*	*Date of Payment*
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
	$126,115.96	

Each party hereto reserves the right to object to the materiality or relevancy of any of the facts above stipulated, and each party reserves the right to offer additional evidence upon the trial of this case."

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner reads as follows:

"* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *.

The question presented to us for solution in this case can be stated as follows:

Was the Tax Commissioner in error

(1) in not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and

(2) in not issuing certificates of abatement to appellant as prayed for in its application?

Or, the question may be stated in another way, to wit:

Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by" appellant (a financial institution), the capital of which financial institution is not divided into shares?

The federal Constitutional provision and the federal statutory enactment relied on by appellant read as follows:

Constitution of the United States, Article I, Section 8, Clause 2:

"The Congress shall have power * * * To borrow money on the credit of the United States; * * *".

United States Code, Title 31, Section 742 (Revised Statutes, Section 3701)

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

The taxation sections of the Ohio General Code involving financial institutions read as follows:

Section 5406:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or ad-

vance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5407:

"The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. Provided that corporations or institutions organized under the provision of the act of congress, known as the federal farm loan act, approved July 17, 1916, and amendments thereto, and insurance companies, shall not be considered financial institutions or dealers in intangibles within the meaning of this chapter."

Section 5408.

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organ

ized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in Section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5410:

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate

heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to Section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to Section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount

of the taxable deposits of each such depositor on the day so fixed."

Section 5412:

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in Section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in Section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5412-1:

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified

on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to Section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose."

Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

"It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands

of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due

or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

Appellant maintains that in assessing, under Section 5612 of the General Code, the "value of the property representing the capital employed" by an incorporated savings society, which has no capital stock, the State of Ohio must exclude from the assets of the institution the value of the United States obligations owned by it.

Appellant further says that Section 5612 General Code provides that the assessment of "property representing the capital employed" shall be measured by "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits" as shown in the institution's annual tax report; and that the inclusion of the value of federal securities owned by such a financial institution in the tax base for assessing the capital employed by such institution in legal effect imposes a tax upon the securities in violation of Clause 2, Section 8, Article I of the United States Constitution and Federal Statute, Title 31, Section 742.

Appellant further says that it is apparent upon the face of the tax returns filed by appellant for the years 1947 through 1951 that the value of United States obligations owned by appellant in each year exceeded by many millions of dollars the total of its surplus or reserve funds and undivided profits and that the exclusion of the value of the United States obligations from the asset values used in computing surplus or reserves and undivided profits would have left no surplus or reserves or undivided profits subject to tax.

Appellant also says that since it is a financial institution having no shares, it necessarily follows that it has no

shareholders from whom it could seek reimbursement for any tax assessed on "the value of the property representing the capital employed," and thus the tax is assessed expressly and directly upon the appellant itself.

The Tax Commissioner says that appellant has voluntarily paid the taxes assessed against it on account of its surplus, reserves and undivided profits and that it can properly pass said taxes on to its depositors inasmuch as there is such an identity between the mutual fund and its depositors that when any such tax is paid the burden thereof is automatically passed on to the depositors.

With this contention of the Tax Commissioner we cannot agree—but even so the question as to whether the appellant may pass the tax on to its depositors is not in issue in this case—and in any event there is no statute which purports to give the appellant the right to pass this tax on to its depositors.

What we are interested in is the answer to this question:

> What is the nature and kind of property which has been assessed for taxation by the Tax Commissioner?

It appears to us to be clear that federal securities are the kind of property that has been assessed for taxation by the Tax Commissioner—for if federal securities are excluded from the Tax Commissioner's base the computation shows no tax due; and it likewise appears clear that the taxes have been assessed against the appellent corporation itself and not against any shareholders or depositors.

The distinction between taxing the shareholders upon their shares, and taxing the appellant upon its "capital or the property representing the capital employed" has been clearly drawn by our Supreme Court in the case of the *Cleveland Trust Company* vs. *Lander*, 62 Ohio State Reports at page 266, affirmed in 184 P. S. 111. That case involved the tax upon the shares as property of the shareholders, which was found constitutional, and the Court said at page 274:

> "Here lies the distinction. The tax is upon the shares and not upon the capital. If the tax was on the capital, the federal bonds would have to be deducted.

but being upon the shares no such deduction is required, allowed or authorized."

However, the decisions of the Supreme Court of the United States leave no room for doubt but that a State tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People v. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank v. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (1914); Missouri v. Gehner, 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665 (1950).

In a case where the issue was somewhat similar to that now before us this Board, in Stephenson and Potter v. Glander, 67 N. E. 2nd 14, 35 Ohio Opinions 368, 46 Ohio Law Abstract 203 (1946) said at page 370 of 35 Ohio Opinions:

> "In the consideration of the question thus presented it is recognized that the tax on dealers in intangibles provided for by Section 5414-1 et. seq., General Code, is a property tax as distinguished from a franchise tax or other form of excise taxes; and that in this case where the tax is on the appellant as an unincorporated dealer in intangibles, the tax is on the employed capital of the appellant itself—unlike the case where the dealer in intangibles is a corporation and the ultimate incidence of the tax is on the shares of stock as property of the shareholders. In this situation and recognizing that the greater bulk of the nontaxable securities here in question consists of United States government bonds, we are required to give application to the principle that the State has no power to assess against a corporation or other like entity a tax which is essentially a property tax, as distinguished from a franchise privilege or excise tax without allowing a deduction for sums invested in securities in the

United States; and this is true whether the tax purports to be one laid directly upon the property or upon the capital of such entity. Home Insurance Company of New York v. New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Home Savings Bank v. Des Moines, 205 U. S. 503, 509, 521, 27 S. Ct. 571, 51 L. Ed. 901."

And again at page 373—

"Although there is, admittedly, some doubt as to the authority of the Board of Tax Appeals as a quasi judicial tribunal to pass on the constitutionality of statutes and to strike down statutes determined by it to be unconstitutional, this Board, like courts and other tribunals possessing judicial or quasi judicial authority, is required to construe statutes so as to preserve, if possible, the provisions thereof as enacted."

With these thoughts in mind and upon the consideration of all the evidence before us we therefore find that the final order of the Tax Commissioner complained of was in error and said final order is hereby reversed.

We find that appellant, by virtue of the failure of the Tax Commissioner (in his computation of the "value of the property representing the capital employed") to exclude from its tax base the federal securities owned by appellant, has overpaid its intangible taxes for the years 1947 through 1951 in the amounts stated in its application for a certificate of abatement; and this case is hereby remanded to the Tax Commissioner with instructions to issue to appellant the certificate of abatement as requested.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

(S.) Francis P. Howard,
Secretary.